

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

KENNETH SOSA,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11798
Trial Court No. 3AN-12-13250 CR

MEMORANDUM OPINION

No. 6327 — May 11, 2016

Appeal from the Superior Court, Third Judicial District,
Anchorage, Michael L. Wolverton, Judge.

Appearances: Hanley R. Robinson, Anchorage, under contract
with the Public Defender Agency, and Quinlan Steiner, Public
Defender, Anchorage, for the Appellant. Donald Soderstrom,
Assistant Attorney General, Office of Criminal Appeals,
Anchorage, and Craig W. Richards, Attorney General, Juneau,
for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock,
Superior Court Judge.*

Judge MANNHEIMER.

* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Kenneth Sosa was convicted of third-degree assault, third-degree weapons misconduct, and coercion.¹ He now appeals his coercion conviction.

Under the definition contained in AS 11.41.530(a)(1), the crime of coercion is committed when someone “compels another [person] to engage in conduct from which [that person has] a legal right to abstain[,], or abstain from conduct in which [that person] has a legal right to engage, by ... instilling in [that] person ... a fear that, if the demand is not complied with, the person [making] the demand or another [person] may inflict physical injury on anyone”.

During Sosa’s trial, the prosecutor argued that Sosa committed this offense at two distinct times, in two distinct ways.

In her opening statement, the prosecutor told the jury that Sosa committed coercion when he punched his girlfriend, threatened her with a handgun, and demanded that she go inside their apartment. A little later in her opening statement, the prosecutor told the jury that Sosa committed coercion again, later that same day (after his girlfriend had left the apartment), by sending his girlfriend text messages that told her, “You better not do the wrong thing”, “Don’t call the police”, “Don’t rat me out, bitch”, “You better [come home and] get inside the house”.

At the end of the trial, during the State’s summation, the prosecutor again asserted that Sosa committed the crime of coercion during each of these two incidents — first, the assault outside the apartment (when Sosa directed his girlfriend to go inside), and then the text messages later that same day.

On appeal, Sosa contends that, under these facts (*i.e.*, when the State argued that Sosa could properly be convicted of coercion based on two distinct incidents), the trial judge committed plain error by not instructing the jury on the requirement of factual

¹ AS 11.41.220(a), AS 11.61.200(a)(1), and AS 11.41.530(a), respectively.

unanimity — *i.e.*, the requirement that the jury reach unanimous agreement as to which of these instances of coercion the State had proved.

The State concedes that it was reversible error for the trial judge to fail to instruct the jurors on the requirement of factual unanimity.

The State further concedes that, as a matter of law, the evidence regarding the text messages that Sosa sent to his girlfriend was insufficient to support a conviction for coercion.

According to the State, the jury could reasonably conclude that Sosa's text messages were intended to deter his girlfriend from contacting the police and reporting his earlier assault, and the jury could also reasonably conclude that, in context, these text messages carried an implicit threat of further violence if his girlfriend went to the police. However, the State concedes that the evidence does not support a reasonable inference that Sosa's girlfriend *complied* with his demand — because she did, in fact, go to the police and report the earlier assault. Thus, although the State's evidence was sufficient to support a conviction for *attempted* coercion, it was not sufficient to support a conviction for the completed crime. *See McGraw v. Cox*, 285 P.3d 276, 279-280 (Alaska 2012).

Based on the foregoing, the State concedes that Sosa is entitled to a re-trial on the coercion count — and that, at any re-trial, the State will be legally precluded from seeking a conviction for coercion based on the text messages that Sosa sent to his girlfriend. We find both of the State's concessions to be well-founded.²

² *See Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (requiring an appellate court to independently assess any concession of error by the State in a criminal case).

Conclusion

Sosa's conviction for coercion is REVERSED because of the lack of a factual unanimity instruction. If the State chooses to re-try Sosa for this offense, the State will be precluded from arguing that Sosa committed the crime of coercion by sending the text messages to his girlfriend.

Because of our disposition of these issues, we do not reach the other issues raised in Sosa's appeal.